

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KEVIN LEE MCCULLOM,

Plaintiff,

v.

GREGORY J. AHERN, et al.,

Defendants.

Case No. 16-00044 HRL (PR)

**ORDER OF DISMISSAL WITH LEAVE
TO AMEND**

Plaintiff, a California state prisoner, filed the instant pro se civil rights action pursuant to 42 U.S.C. § 1983 against Santa Rita County Jail officials. Plaintiff then filed an amended complaint. (Docket No. 7.) Federal Rule of Civil Procedure 15(a) is to be applied liberally in favor of amendments and, in general, leave shall be freely given when justice so requires. See Janicki Logging Co. v. Mateer, 42 F.3d 561, 566 (9th Cir. 1994). Because the matter has not yet been served and no undue prejudice to the opposing party will result, the amendment is GRANTED. The amended complaint is the operative complaint in this action. Plaintiff's motion for leave to proceed in forma pauperis will be addressed in a separate order.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a

1 prisoner seeks redress from a governmental entity or officer or employee of a
2 governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any
3 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim
4 upon which relief may be granted or seek monetary relief from a defendant who is immune
5 from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally
6 construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

7 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
8 elements: (1) that a right secured by the Constitution or laws of the United States was
9 violated, and (2) that the alleged violation was committed by a person acting under the
10 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

11 **B. Plaintiff's Claims**

12 Plaintiff claims that an Oakland Superior Court judge “covertly facilitated”
13 Defendant Deputy R. Martinez “to illegally confiscate” Plaintiff’s “court ordered MP3
14 player,” in order to suppress evidence in a murder case. (Am. Compl. at 3.) Plaintiff
15 claims that the MP3 player contained audio recordings of video interrogations of two
16 witnesses involved in his case, and that the judge and two attorneys “digitally edited [*sic*”
17 these recordings in order to “frame” him for murder. (*Id.*) As relief, Plaintiff wants the
18 deputies involved to be terminated from their jobs, and monetary damages rewarded for
19 “pain suffering mental anguish duress and stress [*sic*].” (*Id.*)

20 Plaintiff’s complaint is problematic for several reasons, the first of which is a failure
21 to identify what constitutional right was violated by the alleged actions by Defendants.
22 Secondly, Plaintiff names several individuals as defendants under the “Parties” section of
23 the complaint, (Am. Compl. at 2), but fails to describe the specific action of each of the
24 Defendants that violated his rights, other than Defendant R. Martinez, in the “Statement of
25 Claim,” (*id.* at 3).

26 With respect to Defendant Martinez’s confiscation of Plaintiff’s MP3 player,
27 Plaintiff may at best state a due process violation for the loss of property, but more facts
28 are necessary to determine whether he states a cognizable claim. Ordinarily, due process

1 of law requires notice and an opportunity for some kind of hearing prior to the deprivation
2 of a significant property interest. See Memphis Light, Gas & Water Div. v. Craft, 436
3 U.S. 1, 19 (1978). However, neither the negligent nor intentional deprivation of property
4 states a due process claim under § 1983 if the deprivation was random and unauthorized.
5 See Parratt v. Taylor, 451 U.S. 527, 535-44 (1981) (state employee negligently lost
6 prisoner's hobby kit), overruled in part on other grounds, Daniels v. Williams, 474 U.S.
7 327, 330-31 (1986); Hudson v. Palmer, 468 U.S. 517, 533 (1984) (intentional destruction
8 of inmate's property). The availability of an adequate state post-deprivation remedy, e.g.,
9 a state tort action, precludes relief because it provides sufficient procedural due process.
10 See Zinermon v. Burch, 494 U.S. 113, 128 (1990) (where state cannot foresee, and
11 therefore provide meaningful hearing prior to, deprivation statutory provision for post-
12 deprivation hearing or common law tort remedy for erroneous deprivation satisfies due
13 process); King v. Massarweh, 782 F.2d 825, 826 (9th Cir. 1986) (same). California law
14 provides such an adequate post-deprivation remedy. See Barnett v. Centoni, 31 F.3d 813,
15 816-17 (9th Cir. 1994) (citing Cal. Gov't Code §§ 810-895).

16 If the deprivation is not random and unauthorized, but the result of "established
17 state procedure," the availability of a post-termination tort action does not necessarily
18 provide due process. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-37 (1982)
19 (failure on part of state commission to hold hearing within statutory time limits not
20 permitted to terminate timely filed claim). Parratt does not apply where the state has
21 procedures designed to control the actions of state officials and the officials act pursuant to
22 those procedures. See Zimmerman v. City of Oakland, 255 F.3d 734, 738 (9th Cir. 2001);
23 Armendariz v. Penman, 31 F.3d 860, 866 (9th Cir. 1994), aff'd in part on relevant grounds
24 and vacated in part on other grounds on reh'g en banc, 75 F.3d 1311 (9th Cir. 1996) (en
25 banc). In those instances, the Fourteenth Amendment requires "'an opportunity . . .
26 granted at a meaningful time and in a meaningful manner,' . . . for a hearing appropriate to
27 the nature of the case.'" Logan, 455 U.S. at 437. Due process is violated where a
28 deprivation is predictable and pre-deprivation process possible, but state officials, acting

1 under apparent authority of state procedures, provide no pre-deprivation procedure and are
2 specifically charged with the authority to effect the deprivation complained of. See
3 Zimmerman, 255 F.3d at 739 (holding that a due process challenge to the deprivation of
4 property may go forward where (1) the deprivation took place at a specific, predictable
5 point in the seizure process; (2) the seizing officer was delegated the power and authority
6 to effect the very deprivation complained of; and (3) he also had the concomitant duty to
7 initiate the procedural safeguards set up under the local ordinance); Armendariz, 31 F.3d at
8 866.

9 Plaintiff shall be given an opportunity to file a second amended complaint to
10 attempt to state sufficient facts to show that Defendant Martinez's actions were not random
11 and unauthorized, but the result of "established state procedure," in order to state a
12 cognizable § 1983 claim. See Zimmerman, 255 F.3d at 739. However, if Plaintiff's
13 allegations show that Defendant Martinez's actions were random and unauthorized, then
14 the claim will be dismissed to filing as a state action. See Barnett, 31 F.3d at 816-17.

15 Furthermore, to the extent that Plaintiff is challenging the lawfulness of his "murder
16 case," it is unclear whether that state criminal proceeding is currently ongoing or has
17 concluded. If the matter is ongoing, then this Court, under principles of comity and
18 federalism, should not interfere with ongoing state criminal proceedings by granting
19 injunctive or declaratory relief absent extraordinary circumstances. See Younger v. Harris,
20 401 U.S. 37, 43-54 (1971). Younger abstention principles also apply in an action for
21 damages in which a federal plaintiff brings a constitutional challenge to a pending state
22 proceeding. See Gilbertson v. Albright, 381 F.3d, 965, 979-80 (9th Cir. 2004) (en banc)
23 (finding damages action based upon constitutional challenge to pending state proceedings
24 implicates Younger principles because in order to determine damages the district court
25 must first decide whether there has been a constitutional violation). Although the Supreme
26 Court has not clearly decided whether abstention applies to a § 1983 suit that includes a
27 claim for money damages, most circuits, including the Ninth Circuit, recognize that
28 Younger principles apply in some manner to § 1983 damages actions. Id. at 979 n.13;

1 Mann v. Jett, 781 F.2d 1448, 1449 (9th Cir. 1986) (applying Younger to federal § 1983
2 claim for damages pending disposition of criminal prosecution in state court). Plaintiff
3 presents no such “extraordinary circumstances” to warrant interference by this Court under
4 Younger, 401 U.S. at 43-54.

5 If the criminal trial has concluded, then Plaintiff’s claim for damages may be barred
6 by Heck v. Humphry, 512 U.S. 477 (1994). In order to recover damages for an allegedly
7 unconstitutional conviction or imprisonment, or for other harm caused by actions whose
8 unlawfulness would render a conviction or sentence invalid, a 42 U.S.C. § 1983 plaintiff
9 must prove that the conviction or sentence has been reversed on direct appeal, expunged
10 by executive order, declared invalid by a state tribunal authorized to make such
11 determination, or called into question by a federal court’s issuance of a writ of habeas
12 corpus. Id. at 486-487. A claim for damages bearing that relationship to a conviction or
13 sentence that has not been so invalidated is not cognizable under § 1983. Id. at 487. If
14 Defendants’ alleged actions did indeed result in an unconstitutional conviction, then
15 Plaintiff must first successfully challenge that conviction in the manner described above
16 before he can recover damages.

17 If Plaintiff is attempting to challenge the lawfulness of his state conviction, such
18 claims may be subject to dismissal based on Younger abstention or Heck bar, depending
19 on the status of his state conviction. The Court will grant him an opportunity to include
20 such a claim in a second amended complaint, provided he includes information sufficient
21 for this Court to consider whether Younger and Heck apply, i.e., whether Plaintiff’s
22 murder case has concluded, and if so, whether Plaintiff was acquitted or if the conviction
23 has since been invalidated.

24 CONCLUSION

25 For the foregoing reasons, the Court orders as follows:

26 1. The amended complaint is DISMISSED with leave to amend. Within
27 **twenty-eight (28) days** of the date this order is filed, Plaintiff shall file a second amended
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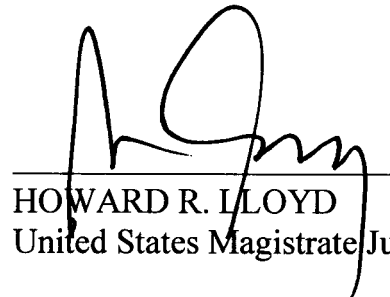
1 complaint using the court's form complaint. The second amended complaint must include
2 the caption and civil case number used in this order, i.e., Case No. C 16-00044 HRL (PR),
3 and the words "SECOND AMENDED COMPLAINT" on the first page. Plaintiff must
4 answer all the questions on the form in order for the action to proceed. Plaintiff is
5 reminded that the second amended complaint supersedes all prior complaints, and Plaintiff
6 may not make references to the original or first amended complaints. Claims not included
7 in the second amended complaint are no longer claims and defendants not named in an
8 amended complaint are no longer defendants. See Ferdik v. Bonzelet, 963 F.2d 1258,
9 1262 (9th Cir.1992).

10 Failure to respond in accordance with this order by filing a second amended
11 complaint will result in the dismissal of this action without prejudice and without further
12 notice to Plaintiff.

13 The Clerk shall include two copies of the court's form complaint with a copy of this
14 order to Plaintiff.

15 **IT IS SO ORDERED.**

16 Dated: 5/27/16

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18 HOWARD R. LLOYD
19 United States Magistrate Judge
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